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DATO' SRI MOHD NAJIB HJ ABD RAZAK v. PP & OTHER APPEALS (NO 3)

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ABANG ISKANDAR CJ (SABAH & SARAWAK)
B
NALLINI PATHMANATHAN FCJ
MARY LIM FCJ
MOHAMAD ZABIDIN MOHD DIAH FCJ
[CRIMINAL APPEAL NOS: 05(L)-289-12-2021(W), 05(L)-290-12-2021(W) & 05(L)-291-12-2021(W)]
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23 AUGUST 2022

Abstract – *The appellant filed an application to recuse the Chief Justice from hearing the appeals and for the appeals to be reheard before a different panel. However, the grounds relied upon by the appellant in support of his application failed to raise a real danger of bias and the application was accordingly dismissed.*

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CIVIL PROCEDURE: *Judge – Recusal – Application to recuse Chief Justice from hearing appeals and for appeals to be reheard before different panel – Whether grounds relied upon in application successfully raised real danger of bias – Whether there were merits in application*

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The appellant filed an application to recuse Tengku Maimun Tuan Mat CJ from hearing the appeals and for the appeals to be reheard before a different panel. The grounds in support of the application were: (i) a Facebook posting by the CJ's husband dated 11 May 2018 ('Facebook posting'); and (ii) a letter from the Bar Council of Malaysia stating that the CJ had no objection if lawyers would apply for adjournments to attend an event called 'Walk of Justice' on 17 June 2022 relating to Mohd Nazlan Mohd Ghazali J ('letter'). Objecting to the appellant's application, the respondent submitted that the said application was *mala fide* and was deliberately filed to scuttle the progress of these appeals as the two grounds relied upon by the appellant related to events that happened four years and three months ago, respectively. The primary issue that arose for adjudication was whether the grounds supporting the appellant's application successfully raised a real danger of bias.

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Held (dismissing application)
Per Tengku Maimun Tuan Mat CJ:

(1) In proving the real danger of bias test, it must be shown that the views expressed by the third party, in this case the spouse, actually impacted on the views of the judge sought to be recused as opposed to simply presupposing that, just because certain general views were expressed as

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a citizen, they are automatically the views of the judge presiding. In other words, the fact of a 'spousal relationship' is not by itself a reason to ascribe the spouse's view to the judge. The fact of spousal connection in itself did not give rise to either actual or apparent bias. There was no nexus between the Facebook posting and the subject matter of these appeals. Furthermore, the Facebook posting occurred four years ago when this case was not even in existence. (paras 11-13)

(2) The letter, which was a non-starter, clearly stated that the CJ had no objection should lawyers seek to apply for the adjournments of their cases from the panels hearing their cases. This was not a blanket grant of adjournments. It was simply to say that the different panels and different chairs retain their discretions to grant or refuse adjournments. It was a standard letter. It could not be seen how this disclosed any fear or real danger of bias sufficient to recuse the CJ. The application was without merit. (paras 14 & 16)

Abang Iskandar CJ (Sabah & Sarawak), Nallini Pathmanathan, Mary Lim, Mohamad Zabidin Mohd Diah FCJJ (concurring):

(1) The event complained of in the first ground happened four years ago. There was no live case at the time of the Facebook posting; the appellant had not even been charged. There could, therefore, be no nexus between that posting and the current appeals. (para 17)

(2) The application lacked *bona fides*, given the series of applications filed in instalments and the staggered timing. There were no merits whatsoever. (para 18)

Bahasa Melayu *Headnotes*

Perayu memfailkan permohonan penarikan diri Tengku Maimun Tuan Mat KHN daripada mendengar rayuan-rayuan dan agar rayuan-rayuan didengar semula di hadapan panel lain. Alasan-alasan yang dikemukakan demi menyokong permohonan tersebut adalah: (i) satu hantaran Facebook bertarikh 11 Mei 2018 oleh suami KHN ('hantaran Facebook'); dan (ii) sepucuk surat daripada Majlis Peguam Malaysia yang menyatakan bahawa KHN tiada bantahan jika peguam-peguam memohon penangguhan untuk menghadiri acara yang dikenali sebagai 'Walk of Justice' pada 17 Jun 2022 berkaitan Mohd Nazlan Mohd Ghazali H ('surat'). Membantah permohonan perayu, responden menghujahkan bahawa permohonan tersebut *mala fide* dan sengaja difailkan demi melubangtenggelamkan perkembangan rayuan-rayuan ini kerana dua alasan yang menjadi sandaran perayu berkisarkan peristiwa-peristiwa yang, masing-masing, berlaku empat tahun dan tiga bulan lepas. Isu utama yang timbul untuk diputuskan adalah sama ada alasan-alasan yang menyokong permohonan perayu berjaya membangkitkan bahaya sebenar berat sebelah.

Diputuskan (menolak permohonan)
Oleh Tengku Maimun Tuan Mat KHN:

(1) Dalam memenuhi ujian bahaya sebenar berat sebelah, mesti dibuktikan bahawa pandangan-pandangan yang dizahirkan oleh pihak ketiga, dalam kes ini pasangan, sebenarnya memberi impak pada pandangan-pandangan hakim yang diinginkan menarik diri, berbanding sewenang-wenangnya mengandaikan bahawa, hanya kerana beberapa pandangan am tertentu dizahirkan sebagai seorang warganegara, pandangan-pandangan tersebut automatik menjadi pandangan-pandangan hakim yang bersidang. Dalam kata lain, fakta 'hubungan pasangan', dengan sendirinya, bukan alasan untuk mengandaikan pandangan pasangan sebagai pandangan hakim tersebut. Fakta hubungan pasangan, dengan sendirinya, tidak membangkitkan berat sebelah sebenar mahu pun nyata. Tiada kaitan antara hantaran Facebook dengan hal perkara rayuan-rayuan ini. Tambahan lagi, hantaran Facebook tersebut dibuat empat tahun lepas semasa kes ini belum lagi wujud.

(2) Surat tersebut, satu pemula yang tidak diterima, jelas menyatakan bahawa KHN tidak mempunyai bantahan jika para peguam ingin memohon penangguhan kes-kes daripada panel-panel yang mendengar kes mereka. Ini bukan kebenaran menyeluruh untuk penangguhan. Ini sekadar menyatakan bahawa lain-lain panel dan lain-lain hakim mempunyai budi bicara membenarkan atau menolak penangguhan. Surat ini adalah surat standard. Tidak dapat dilihat bagaimana surat ini mendedahkan apa-apa kebimbangan atau bahaya sebenar berat sebelah yang secukupnya agar KHN menarik diri. Permohonan ini tidak bermerit.

Abang Iskandar HB (Sabah & Sarawak), Nallini Pathmanathan, Mary Lim, Mohamad Zabidin Mohd Diah HHMP (menyokong):

(1) Peristiwa yang membentuk aduan dalam alasan pertama berlaku empat tahun lepas. Tiada kes berlangsung semasa hantaran Facebook tersebut dibuat bahkan perayu belum pun dipertuduh. Oleh itu, tiada kaitan antara hantaran tersebut dengan rayuan-rayuan semasa.

(2) Permohonan ini tiada *bona fides*, berdasarkan permohonan bersiri yang difailkan secara beransur-ansur dan masa yang berperingkat-peringkat. Permohonan ini sama sekali tidak bermerit.

Case(s) referred to:
Kaycliff Pty Ltd v. Australian Broadcasting Tribunal And Another (1989) 18 ALD 782 ***(foll)***
Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] 1 All ER 65 ***(refd)***
PP v. Tengku Adnan Tengku Mansor [2020] 9 CLJ 30 FC ***(refd)***
United Cabbies Group (London) Ltd v. Westminster Magistrates' Court [2019] EWHC 409 ***(refd)***

For the appellant - Hisyam Abdullah, Mohd Zaid Ibrahim, Liew Teck Huat, Rueben Mathiavaranam, Hannah Kam Zhen Yi, Kee Wei Lon, Low Wei Loke & Ong Kang Nyong; M/s Zaid Ibrahim Suflan TH Liew & Partners
For the respondent - V Sithambaram, Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Mohd Ashrof Adrin Kamarul & Manjira Vasudevan; DPPs
Watching Brief:
For the Bar Council - Tiu Foo Woei; M/s Azri, Lee Swee Seng & Co

Reported by Najib Tamby

JUDGMENT
(Recusal)

Tengku Maimun Tuan Mat CJ:

[1] The appellant, during the course of the hearing of these appeals, has filed an application to recuse me from hearing these appeals and for the appeals to be reheard before a different panel. The application is presented in encl. 300.

[2] The grounds in support of the application are firstly, a Facebook post dated 11 May 2018 by my husband, Zamani bin Ibrahim and secondly, a letter from the Bar Council of Malaysia stating that I, as Chief Justice, had no objection if lawyers would apply for adjournments to attend an event called Walk of Justice on 17 June 2022 relating to Justice Nazlan.

[3] The respondent submits that this application is *mala fide* and filed deliberately to scuttle the progress of these appeals as the two grounds relied by the appellant relate to events that happened four years and three months ago respectively.

[4] It was contended by the appellant that since no affidavit in reply was filed, the truth of the contents of the exhibits are not in dispute. In my view, that does not mean that the legal threshold for bias and recusal has been met. The absence of an affidavit in reply is immaterial because recusal is essentially a question of law.

[5] The Federal Court, in *PP v. Tengku Adnan Tengku Mansor* [2020] 9 CLJ 30; [2020] 5 MLJ 220, has recently affirmed that in order to recuse a judge the test is the 'real danger of bias test'.

[6] The question is whether the grounds of the application to recuse successfully raise a real danger of bias. It is my view, based on decided cases, that the test has not been established.

[7] The first ground seeks to associate the views of my husband made four years ago in his Facebook such that it has now raised the alarms of a real danger of bias. There is a case directly on this point, that is, the judgment of the Federal Court of Australia in *Kaycliff Pty Ltd v. Australian Broadcasting*

Tribunal And Another (1989) 18 ALD 782 ('*Kaycliff*'). This case stands for the proposition that the views of a spouse of a judge cannot in itself be used as a ground for recusal.

[8] In that case, it was argued, among other things, that the chairman of the tribunal in that case ought to have been recused because of certain views expressed by her husband publicly elsewhere. The Federal Court unanimously held that this did not raise any suspicion of bias and in so holding, said as follows:

> The primary judge expressed the view that: "... it would be wrong to conclude that a casual statement by a husband of his views on a matter under consideration by a tribunal of which his wife is a member gives rise to a reasonable apprehension that the husband's views might have been formed after discussion with his wife, or might be communicated to his wife.
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> We agree. Although we have found no authority directly bearing on the point, it appears to us that statements made outside and without the authority of a court or a tribunal by persons who are not its members cannot, in general, disqualify it from proceeding. Persons of considerable public credibility may on occasions make gratuitous statements as to a court's or a tribunal's established attitudes, perhaps even as a stratagem to create embarrassment. We think there are dangers in accepting the doctrine that statements of that kind can prejudice the right or affect the duty of a judge or tribunal member to sit.

[9] In another case called *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] 1 All ER 65, the English Court of Appeal, in considering the 'real danger of bias test', noted as follows:

> 10. ... In any case where the judge's interest is said to derive from the interest of a spouse, partner or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself.

[10] See also: *United Cabbies Group (London) Ltd v. Westminster Magistrates' Court* [2019] EWHC 409 (Admin).

[11] Thus, in proving the real danger of bias test, it must be shown that the views expressed by third party, in this case, the spouse, actually impacted on the views of the judge sought to be recused as opposed to simply presupposing that just because certain general views were expressed as a citizen, they are automatically the views of the judge presiding. In other words, the fact of a 'spousal relationship' is not by itself a reason to ascribe the spouse's views to the judge.

[12] Applying *Kaycliff* to encl. 300, it follows that (i) the fact of spousal connection in itself does not give rise to either actual or apparent bias, (ii) there is no nexus between the Facebook posting and the subject matter of these appeals.

[13] Again, it is reiterated that the Facebook posting occurred four years ago when this case was not even in existence. Simply put there is absolutely no nexus between the Facebook post and the present appeals.

[14] The second ground, the letter, is a non-starter. The letter clearly states that I had no objection should lawyers seek to apply for the adjournments of their cases from the panels hearing their cases. This was not a blanket grant of adjournments. It was simply to say that the different panels and different chairs retain their discretions to grant or refuse adjournments. It was a standard letter. I do not see how this discloses any fear or real danger of bias sufficient to recuse me.

[15] Finally, the fact that certain other judges recused themselves in cases involving the appellant in this case does not itself present a reason for me to recuse myself in this case.

[16] In the circumstances, encl. 300 is without merit and is dismissed.

Abang Iskandar CJ (Sabah & Sarawak), Nallini Pathmanathan, Mary Lim, Mohamad Zabidin Mohd Diah FCJJ (concurring):

[17] Following on from what was just stated by the learned Chief Justice, on behalf of myself and the other members of the coram, we concur and wish to just reiterate the following. The event complained of in the first ground in encl. 300, in particular, happened four years ago. And there was no live case at the time of the Facebook post. The appellant had not even been charged. There can, therefore, be no nexus between that posting and the current appeals.

[18] We further agree with the respondent's submission, for the reasons advanced, that this application in encl. 300 is lacking in *bona fides*, given the series of applications filed in instalments and the staggered timing. We therefore reiterate that there are no merits whatsoever in the application and we would also dismiss encl. 300.